IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 305 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VINODCHANDRA POPATLAL SHAH

Versus

VAJESINHBHAI PUJABHAI SODHA

Appearance:

1. Appeal from Order No. 305 of 2003

MS TRUSHA K PATEL for Petitioner No. 1

MR ASIT M MEHTA for Respondent No. 1

NOTICE SERVED for Respondent No. 2-5

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 17/02/2004

ORAL JUDGEMENT

1. This appeal has been presented against order

dated 31/03/2003 made by the Court of 5th Joint Civil Judge (Senior Division), Ahmedabad Rural below application ex.5 in Special Civil Suit No.170/2002. The appellant herein is the original plaintiff. Heard Ms.Trusha K Patel, the learned advocate appearing on behalf of the plaintiff.

2. It is the case of the plaintiff that defendant nos.1 to 4, through their Power of Attorney holder, defendant no.5, have executed a sale vide registered sale deed dated 02/08/2001 in favour of the plaintiff. That though the plaintiff has become a lawful owner of the land in question, defendant nos.1 to 4 are not vacating the suit land and handing over possession to the plaintiff. The defendant nos.1 to 4 have resisted the suit on the grounds more particularly stated in the written statement. It is pertinent to note that defendant no.5, the Power of Attorney holder of defendant nos.1 to 4, is the son of the plaintiff.

3. It appears from the record that the plaintiff advanced certain sums of money to defendant nos.1 to 4, but the trial Court has recorded that the plaintiff had advanced a sum of Rs.91,000/- to defendant no.1 only. In lieu of this advance, defendant no.1 and his son i.e. Vajesinh Punjabhai and Vakhatsinh Vajesinh executed a Promissory Note (mark 3/1). Similarly, it is found by the trial Court that the agreement of sale (mark 3/3) was also executed only by the said Vajesinh. It is further found by the trial Court that as per the revenue record (mark 3/9) other defendants are also occupiers and owners of the suit land. The trial Court has further found that there is some discrepancy in relation to the final figure of debt as recorded in the sale deed and as claimed by the plaintiff. Taking cumulative effect of the aforesaid documents, supported by the facts and evidence which had come on record, the trial Court has come to the conclusion that the plaintiff has failed to establish a prima facie case.

4. The trial Court has also recorded that in light of the provisions of Section 43 of the Bombay Tenancy and Agricultural Lands Act, 1948, the defendants could not transfer the said lands and hence, even if any document, as claimed by the plaintiff, was executed, the same was hit by the restrictive provisions of Section 43 of the Tenancy Act. Ms.Patel the learned advocate appearing on behalf of the appellant plaintiff contended that the entire order has proceeded on the basis of such a finding recorded by the trial Court, namely, violation of the provisions of Section 43 of the Tenancy Act and hence,

the order is vitiated in law. It was submitted that by virtue of provisions of Section 85 of the said Act, the Civil Court was not competent to record any finding on this aspect of the matter and for this purpose she has placed reliance on the following decisions;

(i) Bhimaji Shankar Kulkarni V. Dundappa Vithappa Udapudi, AIR 1966 SC 166.

(ii) Gundaji Satwaji Shinde V. Ramchandra Bhikaji Joshi, AIR 1979 SC 653.

(iii) Vasava Mohan Moti V. Indravadan Kuberdas Sampatram, 1966 GLR 387

5. There is no dispute as to the legal proposition canvassed by Ms.Patel. However, the submission that the entire order is based on this legal infirmity, is incorrect. As can be seen from the impugned order, the finding regarding the transaction being hit by provisions of Section 43 of the Tenancy Act has been recorded in paragraph 9 of the order. Paragraph 10 of the order begins with the following words. "For a moment if ignore, the above legal position, even though, the plaintiff is not seen entitled to the relief as prayed for by this application." Therefore, it is very clear that the said finding in relation to violation of provisions of Section 43 of the Tenancy Act are in the alternative to the factual findings recorded in paragraph 10 of the order under consideration. In fact, the trial Court is aware of this position and hence it states in no uncertain terms, even if the said finding is ignored, the plaintiff is not entitled to the relief sought and thereafter goes on to narrate facts which have weighed with it while arriving at the conclusion.

6. In light of the aforestated facts and circumstances of the case, it is apparent that the order of the trial Court does not call for any interference. The decision whether or not to grant an interlocutory injunction is to be taken at a time when the existence of a legal right assailed by the plaintiff and its alleged violation are both contested and remain uncertain till they are established at the trial on evidence. (Gujarat Bottling Company Ltd. V/s. Coca Cola Company Ltd., 1995 (5) SCC 545).

7. In the case of Laxmikant V.Patel V/s. Chetanbhat Shah & Anr., AIR 2002 SC 275, this is what has been stated by the Apex Court;

"17. We are conscious of the law that this Court would not ordinarily interfere with the exercise of discretion in the matter of grant of temporary injunction by the High Court and the trial Court and substitute its own discretion therefore except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the order of the Court under scrutiny ignores the settled principles of law regulating grant or refusal of interlocutory injunction. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by Court below solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner the fact that the appellate Court would have taken a different view may not justify interference with the trial Court's exercise of discretion [(See Wander Ltd. V. Antox India P. Ltd., 1990 (Supp) SCC 727 and N.R.Dongre V. Whirpool Corporation, (1996) 5 SCC 714)]."

8. Applying the aforesaid principles to the facts of the case, it is not possible to state that the discretion exercised by the Court has been exercised either arbitrarily or capriciously or perversely. In the circumstances, the appeal is summarily dismissed. Notice discharged.

(D. A. Mehta, J.)

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